

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 2 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

PATEL PREMJI GOBAR SELADIYA

Versus

HEIRS OF BAI AHALYA PUNIRAM

Appearance:

MR DU SHAH for the appellants.
MR AN PATEL for Respondents No. 1 & 2
MRs. RM PATHAN for respondent no.3.

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 01/11/96

ORAL JUDGEMENT

By means of filing this appeal under section 96 of the Code of Civil Procedure, 1908, the appellants have questioned legality and validity of judgment and decree dated November 6,1982, rendered by the learned Civil Judge (S.D.), Gondal, in Special Civil Suit no.61/79 by

which the suit filed by the appellants is dismissed.

2. The dispute between the parties relates to survey no.209/3, situated at Gondal town, District : Rajkot. The land originally belonged to one Laxmanbhai from whom it was inherited by his daughter Ujiben. Deceased Ujiben executed a Will and bequeathed the suit land to Surchand Puniram, who was her husband. Surchand Puniram executed a registered agreement to sell land dated April 3,1969 in favour of the appellants. In the agreement the price of the land agreed to be paid was mentioned to be Rs.49,999/-. The recitals made in the agreement indicate that on the date of execution of the agreement to sell, an amount of Rs.20,000/- was paid by the appellants to deceased Surchand Puniram as earnest money. It was stipulated between the parties that balance was to be paid to the vendor after the vendor obtained probate of will of Ujiben Laxmanbhai. Pursuant to the registered agreement to sell dated April 3,1969, the appellants were put in possession of the suit land. It is claimed by the appellants that in all they have paid an amount of Rs.42,000/to the opponents towards sale price mentioned in the agreement to sell dated April 3,1969. On July 8,1974, respondent no.1, who is sister of deceased Surchand Puniram served a notice on the appellants and claimed possession of the land from them. The possession was claimed on the ground that the appellants failed to perform their part of contract. Notice was replied by the appellants on July 23,1974. Again, on May 8, 1979, respondent no.1 served another notice and claimed possession of the suit land from the appellants. It was the case of the appellants that defendants wanted to take forcible possession of suit land from them. It was asserted by them that they were and are ready and willing to perform their part of contract, but as Will of Ujiben was not probated, sale deed was not executed by the defendants. Under the circumstances, the appellants instituted Special Civil Suit no.61/79 in the Court of learned Civil Judge (S.D.), Gondal and prayed the Court to issue perpetual injunction restraining the respondents from dispossessing them without following due procedure of law.

3. Respondents no.1 & 3 contested the suit by filing written statement at exh.11 and controverted the statements made in the plaint. In the written statement it was claimed that the appellants were not in lawful possession of the suit property and, therefore,were not entitled to perpetual injunction as prayed for. It was pleaded in the written statement that the appellants had not performed their part of contract and, therefore, were

not entitled to the relief claimed in the suit. What was claimed in the written statement was that as the suit was not filed for specific performance of agreement to sell dated April 3,1969,the suit was not maintainable and deserved to be dismissed.

4. Though respondent no.2 was duly served, neither written statement was filed controverting statements made in the plaint by her nor suit was contested by her.

5. The learned Judge framed necessary issues for determination at exh.35. In support of the case pleaded in the plaint, the appellants examined Jivraj Premji at exh.48, Ranchhod Ghelabhai at exh.73 and Jasmat Lakhman at exh.75. The defendants in order to prove the case pleaded in the written statement, examined Ahalyabai Puniram at exh.78 and Pratap Bhavan at exh.80. The appellants and respondents also produced documentary evidence in support of their respective claims.

6. After considering the evidence adduced by the parties, the learned Judge held that as the appellants had not filed suit for specific performance of agreement to sell dated April 3,1969, suit claiming the relief of perpetual injunction was not maintainable. The learned Judge further concluded that the appellants failed to prove that any threat was administered by the defendants to dispossess the appellants forcibly. In view of these conclusions, the learned Judge dismissed the suit by judgment and decree dated November 6,1982, giving rise to the present appeal.

7. Mr. D.U.Shah, learned Counsel for the appellants submitted that suit claiming relief of perpetual injunction is maintainable in view of the provisions of section 38 of the Specific Relief Act, 1963 and, therefore, the Trial Court was not justified in dismissing the suit on the ground that the suit for perpetual injunction is not maintainable without claiming specific performance of agreement to sell dated April 3,1969. It was pleaded that two notices served by the respondent no.1 on the appellants read with sworn testimony of Jivrajbhai Premjibhai exh.48 indicate that the defendants had threatened to dispossess the appellants by use of force and therefore, the Trial Court should have granted perpetual injunction restraining the appellants from dispossessing the appellants without following due procedure of law. In support of these submissions,the learned Counsel for the appellants placed reliance on Division Bench judgment rendered in the case of KESHAVLAL LAXMANDAS PATEL v. NARSINHBHAI KALIDAS

8. Mr. A.N.Patel, learned Counsel for the respondents submitted that suit for permanent injunction without claiming specific performance of agreement to sell dated April 3,1969 is not maintainable and, therefore, the appeal should not be accepted. What was emphasized by the learned Counsel for the respondents was that on appreciation of evidence, the Trial Court has come to the conclusions that the appellants failed to prove that the respondents had threatened them to dispossess by use of force and, therefore, in absence of good ground, the appeal should be dismissed.

9. The question whether suit for perpetual injunction is maintainable without claiming specific performance of agreement to sell or not, is concluded in favour of the appellants by decision of the Division Bench rendered in the case of KESHAVLAL LAXMANDAS PATEL (Supra). In that case, the land in question was standing in the name of defendant no.1. Defendant no.1 had executed an agreement to sell in favour of the plaintiff. Several months thereafter defendant no.1 got the land mutated in the name of defendant no.2. The plaintiff, therefore, filed suit for a declaration that agreement to sell made in his favour was subsisting. The plaintiff also claimed decree for permanent injunction restraining the defendants from selling or transferring the land to any other person in breach of agreement to sell. In the said suit, the plaintiff had not prayed for specific performance of agreement to sell made in his favour. The Trial Court dismissed the suit. While allowing the appeal, Division Bench has held that as agreement to sell does not create any interest or right in immovable property, the plaintiff was not entitled to declaration that agreement to sell was subsisting. The Division Bench has considered provisions of section 38 of the Specific Relief Act,1877 in detail and held that a person who had agreed to sell an immovable property stands in a sort of fiduciary relationship with the person who had agreed to purchase and, therefore, the former cannot commit any breach of his obligation and if he does so, he can be prevented from doing so by a suitable injunction under section 38 the Specific Relief Act.

In view of the decision rendered by the Division Bench in the above referred to case, it is evident that suit filed by the appellants claiming perpetual injunction against the respondents was maintainable. Therefore, the finding recorded by the Trial Court to the effect that suit for perpetual injunction is not

maintainable without claiming specific performance of agreement to sell dated April 3, 1969 being erroneous in law, is liable to be set aside and is hereby set aside.

10. From the contents of notice dated July 23, 1974, which was served by respondent no.1 on the appellants, it is evident that respondent no.1 had claimed possession of the suit land from the appellants on the ground that the appellants had failed to perform their part of contract. Similarly, the contents of notice dated May 8, 1979 exh.68 also indicate that respondent no.1 had claimed possession of the suit land from the appellants. In his sworn testimony before the Court, appellant no.2 stated that the respondents had asserted their right to have possession of the suit land and, therefore, in order to protect possession, suit was filed. In cross-examination, the witness, in turn stated that respondent no.1 and respondent no.3 wanted to take possession of the land. Having regard to the contents of the two notices served by respondent no.1 read with sworn testimony of appellant no.2, I am of the opinion that the appellants have proved the case that the respondents wanted to take possession of the suit land from them by use of force. While deciding the question whether the appellants proved that the defendants had threatened them to dispossess by use of force or not, the Trial Court has not considered effect of two notices which have been referred to earlier. On the facts and in the circumstances of the case, the finding recorded by the Trial Court to the effect that the plaintiffs failed to prove that the defendants had threatened them to dispossess by use of force, is erroneous and is hereby quashed.

11. The appellants were put in possession of the disputed land in part performance of registered agreement to sell and would be entitled to claim relief against forcible eviction in view of the provisions of section 53-A of the Transfer of Property Act, 1882 (See: *Savarkundla Nagarpalika v. Maninagar Nivas Nirman Sahkari Mandli Ltd.*, 22 G.L.R. 866).

12. Under our jurisprudence, it is well settled that even an unauthorised occupant cannot be evicted by use of force. A person in possession can be evicted only in the manner authorised by law. This is the essence of rule of law. (See: (1) *State of U.P. and others vs. Maharaja Dharmander Prasad Singh etc.* Judgment Today, 1989(1) S.C.118 and (2) *Ramshree Mahavir vs. Girdharilal Bholanath and others* 11 G.L.R. 971.). The fact that the

appellants are in settled possession of the land in question since years, is not in dispute. Therefore, suit filed by the appellants deserves to be decreed.

For the foregoing reasons, the appeal succeeds. The respondents are restrained by perpetual injunction from dispossessing the appellants from survey no.209/3 situated at Gondal town, District : Rajkot, without following due procedure of law. The appeal is allowed with no order as to costs. The decree is ordered to be drawn accordingly.

=====